Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45
	)	
1998 Biennial Regulatory Review - Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Service, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms	)	CC Docket No. 98-171
	)	
Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990	)	CC Docket No. 90-571
	)	
Administration of the North American Numbering Plan and North American Numbering Plan Cost Recovery Contribution Factor and Fund Size	)	CC Docket No. 92-237 NSD File No. L-00-72
	)	
Number Resource Optimization	)	CC Docket No. 99-200
	)	
Telephone Number Portability	)	CC Docket No. 95-116
	)	
Truth-In-Billing and Billing Format	)	CC Docket No. 98-170

COMMENTS OF AOL TIME WARNER INC.

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COMMENTS OF AOL TIME WARNER, INC.

AOL Time Warner Inc.,[1] by its attorneys, files these comments in the above-captioned rulemaking proceeding designed to reform the current universal service fund ("USF") collection mechanism and carrier practices regarding pass-through of the costs of USF onto the carrier's

[1] AOL Time Warner is the world's first Internet-powered media and communications company, whose industry-leading businesses include interactive services, cable systems, publishing, music, networks and filmed entertainment.

customers.[2] Under the current USF contribution regime, carriers' contributions are assessed on a percentage of their interstate end-user telecommunications revenues. The FNPRM considers whether the FCC should instead assess contributions based upon the number and capacity of connections provided to a public network. AOL Time Warner applauds the FCC for undertaking this necessary review of the USF contribution system to effectuate better the statutory goals of a USF that is "equitable and nondiscriminatory," "specific" and "predictable," and to promote fair and accurate cost recovery, and offers these insights to assist the Commission in this worthy endeavor.

I. INTRODUCTION AND SUMMARY

AOL Time Warner has a significant interest in this proceeding because it depends on a variety of wireline and wireless telecommunications inputs subject to USF when delivering its services and content to the American consumer. As a customer of telecommunications and telecommunications services, AOL Time Warner indirectly bears USF charges in the form of carrier and other contributor pass-throughs of USF charges. Ultimately, these charges are borne by the consumers of AOL Time Warner's products in the form of increased production costs or higher rates for products and services.

As explained in its prior comments,[3] AOL Time Warner agrees that FCC review of the USF is needed to ensure that it is "specific" and "predictable," especially given current carrier practices that often impose a growing and uncertain USF burden on telecommunications customers. Moreover, carrier pass-throughs of USF charges to customers must be

[2] *See In the Matter of Federal-State Joint Board on Universal Service*, Further Notice of Proposed Rulemaking and Report and Order, CC Docket No. 96-45, et al., FCC 02-43 (rel. Feb. 26, 2002) ("FNPRM").

[3] Reply Comments of AOL Time Warner Inc., CC Dkt. No. 96-45, et al. (filed July 9, 2001).

nondiscriminatory, and not used to force the carrier's competitors (including entities that may also compete for some services) to pay an unreasonable share of the USF burden. Toward this end, carriers choosing to pass-through their USF costs onto end-user customers should be permitted to charge a rate no higher than the FCC's current USF carrier contribution rate.[4] Reform of the USF methodology should also consider the impact on the customers of telecommunications services to ensure that "reform" does not in effect dictate choices or skew market decisions unintentionally.

Further, AOL Time Warner continues to stress that any USF reforms must avoid the potential pitfall of USF "rate shock." While reform may be in the public interest, dramatic, flash-cut changes in the USF could impact a myriad of business and consumer expectations. Any changes to the current system should include a transition process that allows affected parties to understand and plan for proposed changes to their telecommunications costs brought on by USF reform. As a threshold matter, the FCC must first establish parameters and cost estimates for moving from a revenue-based to a connection-based methodology to determine whether such a change is in the public interest. If so, then the FCC should seek further public input on the appropriate timeframe for that transition. While a connection-based contribution methodology has the potential for better meeting the statutory goals of a USF that is "specific" and "predictable," AOL Time Warner believes that many important details of such a methodology must be clarified to ensure that a disproportionate burden is not imposed on certain kinds of services, such as Internet and high-capacity services.

[4] Under the current revenue-based approach, the FCC sets and publishes the contribution factor in advance of each fiscal quarter. *See* http://www.fcc.gov/wcb/universal_service/quarter.html.

Similarly, a connection-based USF methodology, as proposed in the FNPRM, should be predictable and avoid customer confusion by keeping to the logical premise of a single USF charge for a single access facility to the public network. Even if more than one telecommunications or information service is carried across or used for that access facility, such as DSL over a residential line, only one USF charge should be applicable. In the same way, USF charges should be assessed only at the access points to the public networks for Internet communications. While higher-capacity access facilities can perhaps bear a greater USF charge, the charging methodology should not discourage consumers and businesses from purchasing and supporting the deployment of otherwise efficient higher-capacity facilities.

II. PASS-THROUGH RATES SHOULD BE NO HIGHER THAN THE CURRENT USF CONTRIBUTION FACTOR AND ASSESSED IN A NONDISCRIMINATORY MANNER

The Commission should ensure that USF "pass-throughs" are not used as a means for carriers effectively to raise rates or to discriminate against certain services, customers, or classes of customers. The Commission has clearly explained that these charges must be a nondiscriminatory and equitable reflection of the carriers' costs,[5] and that carrier bills must accurately describe the USF pass-through.[6] The problem, however, of excessive USF charges significantly greater than the actual FCC USF contribution factors remains an issue. As Chairman Powell noted, the practices of some carriers concerning discretionary pass-throughs have caused frustration, questions of discriminatory application, and an unfortunate lack of

[5] *Federal-State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd. 8776, 9199, 9211 (1997) ("USF Report and Order").

[6] *Truth-In-Billing and Billing Format*, First Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd. 7492, ¶ 50 (1999).

public confidence in "the value and fairness of the universal service programs."[7] Even where the carrier's pass-through may be justified, continually changing USF charges add to customer confusion and business uncertainty.

Despite these general FCC admonitions, there is not currently much to restrain a carrier's discretionary price fluctuations made in the name of USF "pass-throughs." While the FNPRM notes that the carrier's pass-through practices must be within the general "bounds of reasonableness that Congress established in sections 201 and 202" of the Act,[8] carriers currently have no concrete constraints on what is acceptable and what is simply boundless discretion to change prices of telecommunications services and re-allocate costs among customers. For example, the FCC does not regularly scrutinize carrier pass-through rates or practices, or require reporting or publication of such practices. Further, while the Section 208 complaint process is available, it is also an impractical means of constraining unreasonable or discriminatory carrier conduct, since the individual end-user would have to undertake the expense and delay of protracted litigation.

Although the Commission has attempted to provide carriers with maximum flexibility, it is now time to establish more defined boundaries for USF pass-throughs. This is true whether operating under the current revenue-based method or the proposed connection-based method. Specifically, the FCC should clarify that carriers choosing to pass-through their USF contribution costs may only charge a pass-through that is no higher than the FCC's USF current

[7] FNPRM, Separate Statement of Chairman Michael K. Powell, at 1 (Feb. 14, 2002).

[8] FNPRM at ¶ 89.

contribution factor in effect at the time of billing, and that the carrier must provide customers sufficient notice (e.g., 30 days in advance) prior to any changes in USF pass-throughs.[9]

Some carriers have urged the FCC to allow mark-up of USF charges to account for uncollectibles, administrative costs and other contribution-related costs.[10] If carriers desire to charge more than the current contribution factor, then the carrier should be permitted to charge an additional fixed "safe-harbor" percentage in excess of their current contribution factor only if the carrier can demonstrate to the FCC that the above-factor pass-through rate recovers only the additional and proven costs related to USF. While, theoretically, a carrier may be able to cost-justify more than the "safe-harbor," such an amount is unwarranted as it likely reflects the carrier's own inefficiencies, which should not be borne by the carrier's customers.

The Commission must also address the issue of use of USF pass-throughs as a means of *de facto* discrimination or anticompetitive abuse.[11] As the Commission has noted, a carrier's business discretion cannot conflict with the carrier's legal obligation to offer services on a nondiscriminatory basis.[12] Thus, Commission rules should be adopted prohibiting a carrier from discriminatory pass-throughs favoring an affiliate, such as by allowing an affiliated ISP to avoid USF pass-through charges on ATM backhaul while requiring unaffiliated ISPs to pay such charges or similar practices. As such, AOL Time Warner supports the FNPRM (¶95) proposal

[9] Similarly, if the Commission were to transition to a connection-based USF methodology, the carrier should be entitled to pass-through only the amount of USF contribution caused by the customer's connection.

[10] FNPRM ¶100.

[11] USF Report and Order, 12 FCC Rcd. at 9199 ("Carriers may not shift more than an equitable share of their contributions to any customer or group of customers").

[12] See *Policy and Rules Concerning the Interstate, Interexchange Marketplace, Implementation of Section 254(g) of the Communications Act of 1934, as amended, 1988 Biennial Regulatory Review – Review of Customer Premises Equipment and Enhanced Services Unbundling Rules In the Interexchange, Exchange Access and Local Exchange Markets*, Report and Order, 16 FCC Rcd. 7418, ¶ 46 (2001) ("we would view any such discrimination in pricing, *(footnote continued)*

for carriers choosing to pass-through to "make that line-item amount or percentage rate uniform for all customers."

III. THE PROPOSED CONTRIBUTION METHODOLOGY SHOULD BE IMPLEMENTED TO PROMOTE NETWORK EFFICIENCY AND THE GROWTH OF EMERGING SERVICES

A. The Connection-Based Methodology Should Not Be Implemented To Impact Disproportionately Internet and High-Capacity Services

The FCC accurately describes its mandate to implement an equitable and non-discriminatory system under Section 254.[13] As such, the Commission must be careful not to impose burdens unfairly on certain types of services. AOL Time Warner believes it is critical for the Commission to clarify the scope of the proposed contribution mechanism, especially to define better those services that are not to be included as a "connection" in the proposed methodology, either because they do not provide an end-user with independent access to the public network or because the service has little, if anything, to do with the public network.[14]

First, the FCC should clarify that an Internet communication between an end-user consumer and an ISP involves, at most, two "access points" to the public network for purposes of assessing USF: one "access point" is the telephone line connecting the consumer to the public switched network, and the second "access point" is the access facility (e.g., DS-3 or OC-12) connecting the ISP to the public network. The connection-based methodology should apply a USF charge only upon these two facilities at the "ends" of the Internet communications.

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terms, or conditions that favor one competitive enhanced service provider over another or the carrier, itself, to be an unreasonable practice under section 201(b) of the Act.").

[13] FNPRM ¶ 6.

[14] AOL Time Warner recognizes that the FCC must balance the need for certainty with the need for flexibility as network architectures and services develop. Nonetheless, the FCC should set forth clear guiding precepts and specific guidelines that can apply today and in the future.

The Commission should make clear that USF charges for intermediate facilities or telecommunications inputs for Internet communications would, in fact, undermine the nature of the "connection" oriented approach and would overburden Internet communications with disproportionate and inappropriate USF charges. For example, modem aggregation services offered by telecommunications carriers to ISPs do not provide the end-user or the ISP with an independent "connection" to the public network. Verizon's modem aggregation service, called CyberPOP,[15] for example, offers ISPs a service that aggregates dial-up Internet traffic at modem ports and delivers that traffic to ISP offices via high-capacity facilities. While a connection-based USF method may reasonably be applied to the consumer's telephone line connection used to access the ISP and to the high-capacity connection used by the ISP, none of the intervening facilities, including the modem ports or the telephone company's facilities connecting to those ports, should be deemed an independent connection offered to either the consumer or the ISP.

B. The Connections-based Methodology Should Assess Consumers Only Once For Each Connection

AOL Time Warner agrees that the connection-based approach to USF collection could possibly have advantages in terms of efficiency, reduction of customer confusion, and administrative ease.[16] The Commission's methodology should also support the goals of fairness of the USF system and the creation of proper incentives to innovate new services and invest in more efficient infrastructure. Thus, the $1.00 per-connection charge for residential and single line business connections, and the definition of a "connection" as a "facility that provides an end-

[15] *See e.g.*, Verizon Telephone Companies, Tariff F.C.C. No. 1, § 22; Tariff F.C.C. No. 14 § 16 (TCP/IP Data Aggregation Service).

[16] FNPRM ¶ 71.

user with independent access to a public network,"[17] would appear to be positive steps towards those goals.

AOL Time Warner strongly urges the Commission not to interpret this connection approach, if adopted, to require more than one USF charge per facility, such as requiring a charge for the phone line and then an additional USF charge for the DSL service offered over the same phone line.[18] It is unfair and unnecessary for the customer choosing to subscribe to DSL to pay for USF a second-time for the same loop (assuming the carrier passes-through the USF costs, as almost all carriers do). Moreover, such an approach would raise the consumers' cost of DSL, thereby discouraging broadband and new efficiency-gaining services including line-sharing, which is precisely the opposite of stated FCC goals.[19] It would also be needlessly complex since it could require altering the USF assessment on a given line each time that the customer orders a new service, or, alternatively, it would encourage services to be bundled together artificially to avoid USF charges.

In any case, a line carrying both voice and DSL services should not be deemed to establish two separate means of "independent access" to the public network. Indeed, under many incumbent LEC tariffs for DSL service, a customer may not order DSL service unless the premises to be provisioned with DSL already have an existing local voice service; the two

[17] FNPRM ¶ 41.

[18] FNPRM ¶ 42.

[19] *In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans*, Third Report, CC Dkt. No. 98-146, FCC 02-33, ¶ 133 (rel. Feb. 6, 2002) (FCC's actions are intended to "limit[] regulatory costs and regulatory uncertainty by establishing a regulatory framework for the evolving broadband market.").

services are part of a single connection, which is made possible through splitting the frequency portions of the established "loop."[20]

IV. ANY USF REFORM MUST AVOID "RATE SHOCK" TO END USERS

The importance of a smooth and careful transition as the FCC undertakes USF reform cannot be overemphasized. As suggested by the FNPRM,[21] a transition to a connection-based USF methodology could significantly impact the costs of telecommunications carriers and their customers. It is critically important for the FCC to ensure that USF reform itself does not cause pricing changes for telecommunications services in ways that are unanticipated by the public or by carriers. It is surely contrary to the public interest for USF reform to cause, for example, a "rate shock" on customers using certain telecommunications services. AOL Time Warner, therefore, urges the FCC to assess carefully any changes in USF pass-through costs procedures and any changes in the contribution methodology to determine its impact not only on the USF itself, but also the impact of any changes on both business and residential end users.

While some parties have suggested an immediate transition to the connection-based reform proposal for residential and a 12-month transition for multi-line business lines,[22] the appropriate timing can only be evaluated once the scope of the USF methodology changes are better defined. For example, several variables under the connection-based approach remain unsettled for multi-line business users, such as: the total amount of the "residual" USF costs to be borne by all providers of multi-line business connections, which would follow once issues of

[20] *In the Matters of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Third Report and Order in CC Docket No. 98-147 and Fourth Report and Order in CC Docket No. 96-98, 14 FCC Rcd. 20912, ¶ 9 (1999).

[21] FNPRM ¶ 83.

[22] Id.

the single-line and wireless "connection" assessments are resolved;[23] the number and capacity of multi-line business connections over which the "residual" USF costs are allocated, which would be ascertainable only after "connection" and "independent access" are defined,[24] and the USF obligations associated with private lines are delineated; the appropriate "weighting" factors of the "base rate" for high-capacity business lines, which should be evaluated only after the "residual" USF concepts are more set. Moreover, the proposed connection-based approach leaves open such issues as what assessment, if any, would apply to private lines that do not offer users a connection to the "public network."[25]

Certainly, these examples underscore that the FCC must ask and answer in advance the questions that will almost certainly arise as to implementation on a practical level. Only after major variables of the proposed USF methodology such as these are better defined can users assess the relative costs and benefits of proposed changes to USF methodologies, and the resulting costs of their telecommunications services. At such time, parties will be better able to assess the merits of the proposed USF reform, and an appropriate transition framework if warranted.

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[23] FNPRM ¶¶ 39-43.

[24] FNPRM, ¶¶ 41, 42.

[25] FNPRM ¶ 43.

V. CONCLUSION

FCC review and reform of USF is timely and necessary. AOL Time Warner urges the FCC to undertake a careful and thorough analysis of current USF contribution mechanisms and carrier pass-through practices to ensure better that USF money is collected and allocated in a manner that is fair and reasonable to both carriers and telecommunications users.

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Certificate of Service

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